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No. 2830

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE AMERICAN SCHOONER "HALCYON," her tackle, apparel, machinery, boats, furniture, appurtenances, cargo and freight money, and J. A. T. OLSON, master and claimant,

Appellants,

vs.

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, a Hawaiian corporation, owner of the Steamer "Niihau," for itself, the officers and crew of said steamer and other servants of said owner,

Appellee

APPELLANTS' REPLY BRIEF.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Appellants.

Filed this.....day of December, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

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APPELLANTS' REPLY BRIEF.

In approaching the consideration of this case, we feel that we have a decided advantage over counsel for appellee, because our feelings and enthusiasm have not been wrought upon by participation in the original contest. For this reason, we think that we are better able to distinguish the material from the immaterial elements in the testimony. Respondent's brief is ap-

parently a collation of facts from the record with copious references to pages in the testimony, wherein the testimony is thrown together with apparently very little attempt at analysis, discrimination or sifting as a basis of arriving at a correct conclusion. That many of the witnesses were testifying loosely, with little or no foundation for their statements other than their surmises or predilections, must be admitted. Much exaggeration is apparent upon the face of the record. The stringing together of the strong statements of individual witnesses is of itself of very little value in arriving at the truth.

When everything has been said and done, a careful perusal of the respondent's brief discloses the fact that our opening statement is more than justified, namely: that "in the main the facts are pretty well settled", and that the few facts upon which we lay stress in our opening brief, are the determining facts in this case. For instance, when we consider the position of the "Halcyon" from which she was rescued in the initial towage, we suggested (solely as the result of our own examination of the record and without having seen respondent's brief, or otherwise having been advised of the position that would be taken by them) that

> "Perhaps the most reliable testimony upon this subject (namely, the then position of the Halcyon) outside of that of the master of the Halcyon, is that of Morton, the purser of the Niihau, because he was passing the Halcyon and also the Ka Moi on his way to the Niihau, and observed both vessels."

We then call attention to the final conclusion of that witness upon the subject, and in a word point out how he agrees with the master of the "Halcyon" in regard thereto. We have not dilated upon this subject because we considered the testimony of these two witnesses conclusive.

We now find that the appellee, after his excerpts and numerous citation of pages of testimony of other witnesses upon the subject, is compelled to come to a like conclusion with respect to the effect of the testimony of the purser, Morton, although he attempts to give it a somewhat different effect. He says (p. 16):

> "The purser in a small boat had a considerable better opportunity to judge the proximate distance the schooner was from the piles, as he had just traversed that distance to talk to her, and we submit that his judgment upon it is more reliable than that of one on board the schooner who had *not* traversed that distance."

Of course, if the purser's opinion, for the reasons above indicated, is to be accepted in preference to those *on board* of the schooner, it certainly and for a much better reason, is to be accepted in preference to any other witness *not* on board the schooner.

Such being the case, the fact that his final testimony upon the subject practically agrees with the estimate of Captain Olson regarding the position of the schooner, ought to render it unnecessary to enter upon a discussion of the haphazard testimony of other witnesses less favorably situated then those two, even though some of the other witnesses were on board of

the schooner. We say this because the master of the schooner, being charged with the responsibility of command, would probably be in better position to observe the conditions than the members even of his own crew.

We have also in this connection, which relates solely to the question of the danger to the "Halcyon" in her first position, the fact of the soundings made by the "Niihau's" boats crew, and the comparison of those soundings with the soundings indicated upon the maps introduced in evidence. These soundings indicated that with 3 fathoms of water at her bow, her bow must have been at least as far off shore as the point indicated by the 17 ft. soundings on Libelant's Exhibit 1, which, with the vessel 130 feet long (Rec. p. 166), would place her stern at a point midway on a line drawn between soundings 15 and 16 on that map. Now, measuring from "Halcyon #1", where the vessel lay alongside of the wharf as indicated on that map, to sounding 17, we have a distance of about 520 feet drift from her original position, which is the most that respondent claims she had drifted up to that time. He refers to the testimony of Joseph, who said she had drifted "from that wharf probably six hundred feet." (Br. p. 12.) He attempts to add two hundred feet to that for a subsequent drift, but that is not justified by the evidence. Taking Piersen's statement, upon which respondent relies for this two hundred feet, at its face value, but of which there is no corroboration, it is not only a haphazard suggestion—"Oh, probably a couple of hundred feet"—

but it is distinctly not a movement towards the shore or toward the piles, but a *side* drift from the wharf, viz.: "She ran *over the side toward them boilers.*" (Rec. p. 92.) We are not unmindful of respondent's suggestion (Br. pp. 20-21) that the use of the word "boilers" in this connection is a stenographer's mistake, and should have been "piles", but we cannot accept the suggestion, because the context disproves it. The witness first says "she *didn't* drag *in toward the beach*", (p. 92) and follows it with "she ran *over the side* towards them boilers". The Court will recall that the "boilers" is the place where she went ashore the *second* time, and is a long way to the eastward of the piles. (Map, Lbts. Ex. No. 1.)

In passing, we call atteintion to this method of respondent's statements of fact as evidence of their unreliability. In all his calculation of that drift, respondent treats it as a drift in direct line parallel with the wharf, whereas all the testimony is to the effect that she drifted *out from* the wharf—that she had been made fast to a buoy, and when her wharf lines parted and her stern line let go, she swung out. In fact if she had not swung out at least the distance we have indicated, instead of drifting shoreward that distance, respondent's main contention that she was close to the piles must fail, for without it she could never have arrived at any of the points for which he contends. By consulting the map it will be seen that the piles are somewhat further to the westward of the line of the wharf *than even the point indicated by the 17 ft. soundings.*

This off-shore drift would also be the natural result of the direction of the wind, which respondent claims to have been "a little east of north, and the sea was running in the same direction." (Br. p. 13.) The wharf lies on a line running *17 deg. west* of north, and as the wind and sea were "a little *east* of north", they were across the wharf. This fact accords with the testimony of Captain Bruhn, the master of the "Niihau", that at the point where the "Halcyon" then lay, neither the wind nor the sea was as strong as it was at the outer end of the wharf. (Bruhn, p. 415.)

The calculations attempted by the respondent based upon a measurement of the anchor chains of the "Niihau", and the length of the "Niihau", and the length of the hawser from the "Niihau" to the "Halcyon", and the length of the "Halcyon", is based upon too many elements of uncertainty to be of any real value, viz.: the place where the "Niihau's" anchors were dropped, the amount of the chain let out, the amount of slack on the chains, the amount of hawser let out, and similar matters, all of which are testified to only in language of approximation. Who, with a due regard for accuracy of statement, would undertake to say within a couple of hundred feet, where, on a dark night, the steamer's anchors were dropped? And yet, two hundred feet at the shore end is of vast importance in this case.

It is also to be noticed, that respondent allows but 10 feet slack in 90 fathoms of chain, which indicates no appreciation of the weight of chain, and is practically no allowance at all for slack. Then the length of

hawser between the vessels, which he indicates with the suggestion "say another 390 feet", which would give him the 65 fathoms straight as a string. The witness uses the expression, respecting the length of hawser, that it was "about 60 or 65 fathoms", and counsel uses the extreme for his calculation, without allowance for its sag, which we all know shortens the line very materially. All this indicates the extreme views which respondent finds it necessary to adopt in order to make out his case.

Again, in order to indicate that the vessel must have been ashore, he suggests that it took the "Niihau" from 2 to 2½ hours to tow the vessel from that point to the point where her tow line parted, a distance of "some 600 to 800 feet." (Br. p. 26.) This is based upon the testimony of the engineer of the "Niihau" that the vessel began pulling on a taut hawser at 4:30 A. M., and that the towing continued "with his engines at full speed until *about* 6:50 or 7 o'clock the line parted". But this scarcely accords with the testimony of the other witness to whom respondent refers, namely, the witness Joseph, that the steamer heaved on the tow line for probably *an hour* before she started towing.

This testimony of 2 to 2½ hours, is the basis upon which respondents attempt to fix on 7 o'clock as the time the hawser parted, to which subject we shall now address ourselves.

It is very significant that

RESPONDENTS' ENTIRE DEFENSE RESTS UPON THEIR ATTEMPT TO DISCREDIT THE TESTIMONY OF THEIR OWN MASTER, THE MAN IN COMMAND OF THE "NIHAU", AND UPON WHOM RESTED ALL THE RESPONSIBILITY OF THE SERVICE.

Note the following (Br. p. 36):

> "Bruhn fell short as a witness merely that he was unable to judge the lapse of time, in which connection we submit that his estimates of time were wrong, rather than that he lay idle for a long time, as appellee claims."

Again:

> "Bruhn's inability to account for the passage of *two* hours, instead of one hour, from the time that the line parted until she went ashore (see Tr. 393-410) shows conclusively, when we note all the other testimony, that Bruhn was simply confused in his own mind about the matter of *time,* both *as to the clock* and the lapse of time, but that he doggedly stuck to his original estimates, perhaps because he had once given them, *although it should early have appeared to him that his inability to account for the balance of the 'two hours' was because he was wrong somewhere."* (Br. p. 37.)

So, also, in the addendum to the brief, referring to our argument, it is said (p. ii):

> "The whole argument is based on Captain Bruhn's *erroneous* testimony that the first line parted at 6 A. M., which is fully explained in our brief."

Again (p. iii):

> "It is perfectly clear that Bruhn was mistaken when he said six o'clock instead of seven o'clock, yet it is entirely on his mistake that appellant's flimsy charge of negligence is built."

As suggested in our opening brief, Captain Bruhn testified that the tow line parted at about 6 o'clock in the morning. We think there is little to be gained by reference, as in respondent's brief, to a single sentence or expression of any witness,—the entire testimony upon any given subject, should be considered; no part is of any value except in its relation to the context. We have, therefore, upon this subject, *referred the Court to pages 394-409 of the record,* meaning thereby to refer to the entire testimony of Captain Bruhn upon this subject, and we are not justly chargeable with relying upon "a small portion of the testimony which is cited" (Addendum, p. ii) simply because we do not reprint it in the brief.

For the satisfaction of respondent, let us now refer to it more at length. Captain Bruhn fixes the time when the tow line parted at "somewhere around six and a little after six." (p. 393.) He is then very carefully examined with relation to his actions between that time and the time he passed the line for the second tow, and is finally asked the question:

> "Q. Now, it was somewhere in the neighborhood of about two hours from the time that the tow line parted until the 'Halcyon' reached the beach. How do you account for the balance of that time?" (p. 400.)

It will be observed that the witness makes no suggestion that there is any error in the statement that this interim was as long as two hours, but he answers:

> "Well, the 'Halcyon' was dragging in slowly; she was dragging during that time.
> Q. Yes, but what were *you* doing?

A. We was, I explained that before; *I was watching her.*''

Again, he is asked:

''Q. Now, Captain, I am not quite clear. You sent the 'Halcyon' a line from N, your position at N 2 between eight and half past eight? Is that right?

A. Thereabouts.

Q. You say the tow line parted between six and half past six?

A. The tow line parted a little after six.

Q. So that two hours elapsed from the time the tow line parted until she, until you sent her a line from N 2?

A. She was lying to an anchor there; there was no necessity of sending a line until she commenced to drag.

Q. Then she was lying at anchor at what place?

A. She had put her anchor down.

Q. Wasn't she dragging at that time?

A. Not right off.

Q. How long a time did she remain without dragging?

A. I said that before; in the neighborhood of 15 minutes before I noticed particularly that she was dragging.'' (pp. 400-401.)

Again:

''Q. Now, Captain, here is what I am trying to make clear to the Court, and that is, what you were doing during the time that intervened from the time that she began dragging or that the tow line parted, until she went on the beach, as near as she ever got?

A. The 'Niihau' was lying to anchor.

Q. No, two hours elapsed, is not that so, Captain, from the time that her tow-line parted until she went on the beach; we will assume that she went on the beach. Two hours elapsed?

A. I don't think it was quite two hours.

Q. Well, anyway, you said that you sent her a line from your vessel at N-2, between eight and a half past eight.

A. Somewhere in that neighborhood.

Q. You say that the tow-line parted little after six?

A. Little after, yes, sir.

Q. That makes at least 2 hours, does it not?

A. Yes." (p. 401.)

Again, at page 402:

"Q. You said it took, in substance, you said it took 2 hours to go from the time that the tow line parted until you sent a line to the 'Halcyon'.

A. While she was in a safe condition.

Q. Yes, but that was only about 15 or 20 minutes that she was in a safe position.

A. That is a long distance; she's a long ways from the beach here.

Q. What were you doing at that time?

A. I was lying to an anchor and watching the 'Halcyon'. They were moving over here; when she was going in we followed her up." (p. 402.)

Finally the Court takes a hand in the examination, and says (pp. 404-406):

"The Court. Counsel wants to find out in this hour and three quarters from the time the line parted and the 'Halcyon' dragged anchor up to the time she drifted on to the beach, as I understand, is between an hour and three quarters and two hours. He wants to know how you occupied that hour and three quarters; he wants you to cover the whole of that hour and three quarters and tell him what you were doing.

Mr. Russell. May I remind the Court the time is longer—from six or half past six to half past eight.

Mr. Warren. May I also remind the Court and counsel that the witness is taking into consideration the time he not merely sent the line, but got it aboard and got it taut up to the time they began heaving.

The Court. Let's get that straight from the witness. He wants to make you account for this time; *he wants to show that you stood still for a while, and it's very important that you should know what you are talking about;* whether you are taking from the time of the 'Halcyon' dragging her anchor and the line parted, up to the time she had drifted ashore and stopped; or whether these two hours covered when her line parted up to the time you got the line aboard.

A. In this position here, your Honor, we was working on the 'Halcyon' all the time.

Mr. Warren. N—2?

A. That's where we were working. After we had the first line, in my opinion, the vessel wasn't quite ashore then. She was coming in here. She commenced to go broadside, which I explained before, when she got in here near the beach, the suction under her stern and also the back action from the beach.

The Court. Then the two hours, was that the time, two hours to the time you got your line aboard?

A. That's included; all those times there, from the time we anchored here, the time we was working on the 'Halcyon'; got the line over to the 'Halcyon', hove on this line; and the boats had to come back and get that second line and make that fast.

Q. That two hours, was that the time that you got the line aboard, the first line? There were two lines after her line parted and she dragged anchor?

A. Yes; it was taken up here a little after six, which I say; and up to the time that she drifted up on the beach, we was maneuvering the ship.

Q. What time did she drift on the beach?

A. On the beach there, that was after eight. She never got exactly on the beach.

Q. *That was two hours, then, from the time the line parted up to the time she grounded?*

A. *About that.*"

Again (p. 409):

"Mr. Russell. Captain, you say that the tow line parted a little after six; now, how much after six, to the best of your recollection?

* * * * * *

A. It might have been between six somewhere around quarter past six; might have been a little after or a little before. I know it was after six.

* * * * * *

Q. Now, to your best recollection, Captain what time was it when you sent the boat's crew with a line, the six-inch line to the 'Halcyon'? What time was it at that time?

* * * * * *

A. The time that we commenced?

Q. No; what time was it after that period, at that point?

A. It was around eight o'clock; a little after.

Q. You say a quarter after?

A. I didn't have time to look at the watch then because my mind was occupied.

Q. Would you say it might have been a quarter after eight?

A. I couldn't give the exact time, but it was in the neighborhood around eight o'clock; little before or little after."

We do not have to concern ourselves with the Captain's uncertainty about this time, because it is definitely fixed by Mr. Nichols from a memorandum made at the time. There is no claim that the lines were made fast to the "Halcyon" before she broke out her signals of

distress. The most that libelants claim is that the small boat was then on the way to the "Halcyon", which is testified to by Mr. Nichols. But the time when the signals broke out was 8:35, and he adds, that the small boat departed for the "Halcyon" about five or ten minutes after the signals went up.

Can there have been any room for this witness to have been mistaken after such a careful examination both by counsel and the Court definitely and repeatedly pointing out to him the purpose of the interrogatory, calling his attention again and again to the fact that at least two hours is the time, according to his testimony, between the parting of the hawser and the start to render assistance on this accosion? Over and over again, the master testifies the time of the parting of the hawser at six or a little after, at no time suggesting it exceeded a quarter past six. Repeatedly the witness testified that he was lying at anchor, watching her drift, and *attempts to fill up the interval with suggestions of maneuvering, of preparation,* which finally simmer themselves down to twenty or twenty-five minutes, and the definite fixing of the completion of these maneuvers and the departure of the small boat for the "Halcyon' at 8:35.

Respondent's comment upon this testimony is that

> "Bruhn was simply confused in his own mind about the matter of time, both as to the clock, and the lapse of time, but doggedly stuck to his original estimates, perhaps because he had once given them, although *it should early have appeared to him* that his inability to account for the balance of his two hours was because he was wrong somewhere. He

> said he 'never marked the minutes down.' (Tr. 393.)'' (Br. p. 37.)

This reference to his remark that he ''never marked the minutes down'', does not meet the issue. It was said simply in connection with, and refers to the time it took him ''to steam down there and re-drop the anchors; that didn't take long''. (Rec. p. 398.) It does not pretend to qualify the testimony that two hours elapsed between the parting of the hawser and the putting out of the small boat to the ''Halcyon''.

We are fully in accord with respondent's suggestion that

> ''it should early have appeared to him (Bruhn) that his inability to account for the balance of the two hours was because he was wrong somewhere''.

Indeed, under the frank and direct interrogatories of cross-examining counsel, and under the careful instruction of the Court, as well as the prompting and suggestions of his own counsel the witness could not have failed to understand the full purpose of the examination. But the suggestion that he was unable to account for the time ''because he was wrong somewhere'', begs the entire question. There was one of but two clean-cut issues to be met, viz.: Did the line part at six or a little after, or was he guilty of negligence, or something worse in not proceeding sooner to the rescue? How can it be claimed that ''he was simply confused in his own mind about the matter of time'', when the matter of time was so clearly and carefully presented to him? And mark you, also, counsel refers to the witness as having the clock time in mind—''both as to the clock, and the

lapse of time". Note also, as pointed out in our original brief, when the question of the length of this time was first brought to his attention, he attempts to fill up the time by "preparations" to render the service:

> "Q. What were you doing in the meantime from the time that you saw her dragging until she got on the beach, until she got as close to the beach as she ever got; that's an hour and three quarters?
> A. We was preparing." (Tr. 396.)

Here counsel for respondent attempts to come to the rescue, as it will be noted he does throughout this trying period of the examination. But as the cross-examination proceeds, it develops that this excuse of "preparing" would not answer the purpose, and it is quite as just a conclusion from the entire testimony that the *witness's consciousness of guilt* with respect to the delay and his failure to cover it with the excuse of time occupied "in preparing", was the "wrong somewhere" which "early appeared to him as the reason for his inability to account for the balance of the two hours", as that the fact that the line parted at seven, instead of six o'clock was the "wrong somewhere".

But we have other testimony which supports the claim that the line parted close to six o'clock more reliable than any of the testimony upon which respondent relies to discredit his chief witness:

Paulos, upon whom respondent mainly relied upon to fix the time of the parting of the hawser at seven o'clock (speaking of the initial service), says that

> "The 'Niihau' began to pull on the taut towing hawser at 4:30 A. M., and that the towing continued

> with his engines at full speed until 'About six-fifty or seven o'clock the line parted'." (Br. p. 26.)

This testimony is relied upon to prove that the vessel was hard aground in the initial tow, and that it took them "from two to two and a half hours" to tow her "some six or eight hundred feet in distance".

Whatever the situation of the "Halcyon" with respect to being aground at the time of the first service, it is certain that she was not worse aground than she was in her second position. In the first position, she was supported by two anchors and a line to the buoy, and was, so far as the sea is concerned, protected by the wharf. There is no question about this from the testimony. In her second position, she was more exposed to the wind and sea, and (if we are to accept the contention of the respondent), had broached to on the beach and among the breakers. *Yet, in this last position, the time is definitely fixed at both ends of the service.* The small boat left the "Niihau" for the "Halcyon" at 8:35. She must have made two trips, because upon this occasion two separate hawsers were passed between the vessels. Thereafter she was carefully straightened up, drawn off the beach and towed out into the harbor much further than on the first occasion, which tow was completed at 10:15. (p. 440.)

Now, upon the occasion of the first tow, observe that the time to which Paulos testifies is reckoned, *not from the time they began to pass the hawser,* but *from the time the "'Niihau' began to pull on the taut towing hawser".* (Br. p. 26.) On the second tow, however, the

time is fixed at the time the "Niihau" first *sent out a small boat to pass the first hawser.* Yet the *entire time occupied in passing two hawsers, straightening the vessel up, taking her off the beach, and taking her out to her safe anchorage* where she could drop her anchor, *is one hour and forty minutes.* To say nothing of the elements of credibility affecting Paulos' testimony, which are apparent in the record, this positive testimony as to the time it required to perform a greater service, renders it certain that Paulos' estimate of time required to render the lesser one, is at fault. *Assuming* that the latter service took at least *as long* as the former, we have an hour and forty minutes, from 4:30 o'clock, which *fixes the time of the parting of the hawser at 6:10*—precisely the time testified to by Captain Bruhn.

Moreover, we have the positive and uncriticised testimony of Mosher, called for the libelant, that he first took notice of the vessel at *about seven o'clock;* when he observed her *she was dragging* her anchor slowly. (Tr. 344.) The line must have parted some time before that, because, according to the contention of the libelant they did not notice her drag *until fifteen or twenty minutes after the line parted.* How long she had been dragging before Mosher observed it, however, does not appear. Mosher, however, testifies that he saw the signals of distress go up somewhere about 8:35. (p. 345.) That is also nearly two hours. What was Bruhn doing in the meantime?

Thompson, the second mate of the "Niihau" says that in the morning about 4 o'clock the purser's crew reported the "Halcyon" ashore. (p. 307.) That the

six-inch line parted "it must have been between six and seven in the morning". (pp. 312-13); that they had then been towing *"probably over an hour"*. (p. 313.)

Morton, the purser, testifies:

> "Q. How long did it take you after you were told after you were asked to take a line to the 'Halcyon' before the 'Halcyon', *before you started towing her out?*
>
> A. I should say about three-quarters of an hour, half an hour, or thereabouts."

An hour and three-quarters from 4 o'clock is a quarter to 6.

We might extend these references by quoting from Nichols and Easton, whose testimony is accurate and unqualified regarding the inaction of the "Niihau" but it scarcely seems necessary to spend so much time upon this question. The line having been passed to the "Halcyon" in her second position at 8:35, of which there is no dispute, there appears under the very best assumption on the part of respondent, to have been an hour to an hour and a half before there was any attempt to go to the rescue—this allows for 20 to 25 minutes claimed by Bruhn "for preparing", while under our contention it was fully two hours or more. In either event, there was gross negligence.

We might very well conclude this subject by adopting the appellant's own statement, which assumes that

the hawser parted at seven o'clock, instead of six o'clock. He says (Addendum, iv):

> "We have, then, the following situation pretty clearly established: The towing hawser broke at about 7 a. m., and the 'Niihau' changed her position *about three quarters of an hour or an hour thereafter,* as soon as the 'Halcyon' was in fact found to be appreciably drifting."

We pause here for a moment to point out that, according to Captain Bruhn, "The 'Halcyon' was in fact found to be appreciably drifting" in fifteen minutes after the hawser parted; so we have here, in counsel's own statement, about three-quarters of an hour of inaction. Continuing, he says:

> "And about *half or three quarters of an hour* later the 'Niihau's' boat left for the 'Halcyon'."

Thus on his own statement, taking his assumption in its most favorable light to ourselves, it was *an hour and three-quarters* from the time of the parting of the hawser until the "Niihau's" boat left for the "Halcyon". Respondent's comment upon this is interesting. He says:

> "Surely a short space of time to allow for the shifting, redropping of the anchors, coiling the rope, getting the boat ready, etc., in spite of appellant's caustic criticism of Capt. Bruhn for the time spent by him in 'preparing.' Such maneuvers in a storm require time, and it is surprising to us that so little time was taken. The learned Judge who decided the case, and who is more familiar with conditions in the Hawaiian Islands than any man now living (having been head of the Provisional Government, President of the Republic and First Governor of the Territory), said that 'such

> preparations might well have occupied an hour and a half or more'."

This is a direct admission that there was "an hour and a half *or more*" between the parting of the hawser, and the departure of the small boat. But the testimony is conclusive that the time required for "the shifting, redropping of the anchors, coiling the rope, getting the boat ready, etc." did not exceed twenty-five minutes, which leaves an hour and twenty minutes, according to respondent's own figures, unaccounted for. Thus the nautical skill of counsel, as well as that of the learned Judge who decided the case (whose judgment in this respect respondent seems to think is fortified by the fact that he had "been head of the Provisional Government, President of the Republic and first Governor of the Territory—all undoubtedly positions which contribute to nautical experience inasmuch as he was steering the "ship of state") are both found at fault.

Another excuse is sought in the suggestion that when the tow line parted, Capt. Bruhn

> "saw the captain of the schooner (or a man on the quarter deck whom he took to be the captain) making a waiving motion with his arms which he read as meaning that the tow was sufficient from the schooner's point of view. (Tr. p. 341.) From this he assumed that his line had been cut on board the schooner, a circumstance which made him try to yell across in the storm to demand why. Seeing the schooner then drop anchor he not unnaturally assumed the schooner's captain was satisfied to

stop there,—in other words he was dismissed." (Br. p. 28.)

Let us consult the testimony a moment and see whether this suggestion is justified. Captain Bruhn testifies (Rec. p. 341):

"Q. Were you observing the 'Halcyon' at the time the line parted, and did you see anyone on board make any signals?

A. No.

Q. Do you know where the Captain was, on the 'Halcyon'?

A. No.

Q. Or anybody that you took to be the Captain?

A. Nobody on the fo'c's'le excepting this man that threw his arms out.

Q. When did he do that?

A. Just about when the line parted.

Q. How did he throw his arms out?

A. Throw them out like that. (Indicating by raising arms parallel to the floor then dropping them down.)

Q. Was that a kind of a signal, a customary signal? What would you take that signal to mean?

A. That is generally used as a signal.

Q. What's that signal for?

A. Maybe, in case we have anything, for us to let go; *otherwise to let go an anchor or anything like that; used for both purposes.*

Q. Where was that man standing on the 'Halcyon'?

A. On the fo'c's'le-head, sir.

Q. Did you make any signals in reply?

* * * * * *

A. No.

Q. What did the 'Halcyon' do immediately upon the line being parted or let go?

A. *Dropped her anchor.*

* * * * * *

Q. Did you pay any attention to the 'Halcyon' after that?

A. Yes. Standing and looking at her.

Q. What did you observe?

A. Well, after a while I saw her dragging in shore.

Q. How long after the line had parted and she dragged anchor was it that you saw her dragging?

A. About fifteen or twenty minutes.

Q. Could you determine then whether she was dragging, or just what she was doing?

A. Yes; I noticed that she was dragging absolutely then and we started to get our line ready again to run to her'' (pp. 341-42-43).

Does that look as though the captain had accepted the raising of the arms as a signal of dismissal? And if he did so accept it, did he not conclude differently within 15 minutes? He interprets the meaning of the signal, among other things, ''to let go an anchor or anything like that'', and the ''Halycon'' did let go her anchor. Unquestionably that is what the signal was intended for. Neither does Captain Bruhn suggest that he accepted the situation as a dismissal. He says he stood by, looking at her for 15 or 20 minutes; noticed she was dragging absolutely, and says he started to get his line ready again to run to her.

Attempt is made to palliate the action of Captain Bruhn by charging Captain Olson with failure to accept the services of the launches offered at the time of the

parting of the hawser, and suggests that it is "a case of the 'pot calling the kettle black', when Olson now cries that he was neglected and allowed to go ashore helpless and unaided." (Br. p. 33.)

Assuming that the "pot" was "black', it does not appear to us to be any excuse for the "kettle", which was itself charged with a definite duty. It had assumed a service and responsibility which it was bound to perform, and if by reason of negligence, incapacity, or want of good seamanship on the part of the master of *the distressed schooner, her danger was thereby increased,* the responsibility lay upon the salvor to that extent for *increased diligence and activity.* The danger to the schooner may have been increased by a lack of good seamanship on the part of her own master. If so, it was, in addition to the storm, an additional element of danger placing additional responsibility upon the salvor.

But we do not find any evidence which justifies the criticism of Captain Olson indulged in. He was at the time in a critical position, and had his hands full. As already suggested in our opening brief, he had orginally drifted when in a more protected position with better hold than he had at the time the hawser parted. When the hawser parted he was called upon to act in an emergency; he was busy dropping his anchor, and attempting to save his vessel from a critical position off the shore. He knew he was in charge of the steamer, to whom he naturally looked for protection, and could not afford to be distracted or bothered with the importunities of the small launches, which he

knew could not render him efficient service—certainly not the kind of services that the steamer could render which had him in charge and lay but a hawser's length away. In this situation, being both busy and distressed, he would naturally look to the steamer for succor, and would naturally dismiss the lesser and inefficient help, threatening him with additional salvage claims. It may be that he was in error in not excepting the services of the launches to run a line, but if so, it was an error of judgment in an extremity, which could in nowise excuse the vessel which had him in charge, and which latter vessel, so far as the record shows, knew nothing of either the offer or availability of other aid.

But it is said that he "did not want assistance, and did not ask for it". The suggestion that he "did not want assistance", is gratuitous. He did not want such assistance as the launches proposed, but there is no ground for the suggestion that he did not want assistance from the steamer. To support this latter suggestion, reliance is placed upon the supposed "signal of dismissal". But there is no evidence that there was any "signal of dismissal", so far as Captain Olson is concerned, and we have already shown that there was no warrant for Captain Bruhn's assumption that the signal, which he alone testifies to having seen, was intended as a signal of dismissal, or was construed by Captain Bruhn to be such signal. Captain Bruhn knew that he had not completed the service as he had originally intended—that he had not taken her to what he deemed a safe anchorage, and when he lost the vessel,

it was not for him to wait for another signal of distress before completing what he had undertaken.

To conclude, we desire only to suggest, that as respondent's entire defense rests upon an attempt to discredit their own principal witness, and since, if they do succeed in fixing the time of the parting of the hawser somewhat later than six, or a little after, they are still compelled to account for two hours, or thereabouts, of inaction; and further, since they can find no better answer therefor than the suggestion that "the pot is calling the kettle black", and an appeal to the conclusion of the District Court which is very much in the nature of an appeal to the statement of the Court as the testimony of an expert upon the subject, we do not feel that they have made very much advance in the argument, particularly as the most reliable other testimony in the case supports our contention.

In closing, we note a very peculiar appeal to the Court as a reason why it should not disturb this award. After making their claim for the service as one of "high merit", they conclude:

> "If, however, the present award be substantially reduced, and the appellee be compelled to pay the costs in this court, it is very apparent that there will be *practically nothing* left to it to reward it for said achievement."

No comment is necessary in reply to such an appeal. If, as a matter of justice, the award should be either

reduced, or denied in its entirety, there can be no justice in throwing the costs upon the appellant, who, without such appeal is entirely left without redress, and, if the costs be saddled upon him would to that extent be denied redress.

We respectfully submit that the libel should be dismissed, and appellant allowed its costs in both Courts.

Dated, San Francisco,
December 4, 1916.

NATHAN H. FRANK,
IRVING H. FRANK,
Proctors for Appellants.